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No. 93-1252

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

THE STATE OF OKLAHOMA

Petitioner,

vs.

SCOTT ALLEN HAIN

Respondent.

RESPONSE TO THE PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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March 14, 1994

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, Scott Allen Hain, by and through his attorney, John Thomas Hall, requests that the United States Supreme Court deny the Writ of Certiorari to hear the issues raised in said Petition for and because there are no federal grounds and the decision on which the issue of retroactivity of the giving of the life without parole sentencing option in first degree murder cases in Oklahoma was decided on adequate and independent State grounds. The Respondent has submitted other arguments in this matter on the same opinion below in U.S. Supreme Court Case No. 93-7066.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals below which is the subject of this Writ is Hain v. State, 852 P.2d 744 (Okla. Cr. App. 1993). The opinion is attached as the Appendix in Case No. 93-7066, supra.

JURISDICTION

The Respondent denies that the Court has jurisdiction pursuant to 28 U.S.C. § 1257 (a) because there is no equal protection issue and the issue complained of by Petitioner was decided on adequate and independent State grounds.

STATEMENT OF THE CASE

The Respondent would adopt his Statement of the Case in Case No. 93-7066, and would state that there is no material disagreement with Petitioner in its Statement of the Case.

SUMMARY OF THE ARGUMENT

The Petitioner argues that the decision of the Court below is a violation of Equal Protection. The Respondent would argue that Equal Protection applies to an individual, not a group. This by simple logic would demand that any group which would come under the aegis of Equal Protection would have to have at least one individual in it. As the State freely admits, there are no persons in this class. Further, Equal Protection is not available to the State. Hence, Equal Protection does not apply and the Writ should be denied. Mitchell v. United States, 313 U.S. 80, 85 L.Ed.2nd 1201, 61 S.Ct. 873 (1941); Pennsylvania v. New Jersey, 426 U.S. 660, 49 L.Ed.2nd 124, 96 S.Ct. 2333(1976); Oklahoma v. Ballard, S-91-769, 65 OBAJ 560 (February 12, 1994).

Further, the next two arguments of the Petitioner deal with no recognizable federal issue. Moreover, if there is any federal issue, such as the construction of "death is different", the decision by the Court below was made on adequate and independent state grounds. The only complaint seems to be that the Court below has chosen in the instance of the death penalty to approach sentencing in a way that is fundamentally fair, and has decided that, in this case, the change in sentencing involves a fundamental right and, therefore, is retroactive. Wherefore, there is no jurisdiction under 28 U.S. § 1257 (a). Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983); Coleman v. Thompson, 501 U.S. ___, 111 S.Ct 2546, 115 L.Ed.2d 640 (1991); Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989)

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. EQUAL PROTECTION IS AN INVALID ARGUMENT IN THIS INSTANCE AND IS UNAVAILABLE TO THE STATE OF OKLAHOMA AS A FEDERAL QUESTION PURSUANT TO 28 U.S.C. § 1257.

Anglo-American jurisprudence is quite clear concerning the methodology for determining whether or not there has been a violation of equal protection and, therefore a denial of due process of law by the establishment of an unconstitutional class. A case which sets forth this analysis is Pappanastos v. Board of Trustees, 615 F.2d 219 (1980, CA5 Ala.), at 220-221. The Court found:

" we must first determine the burden of justification the [challenged] classification [person].... must meet" (Cit.omit.). "The proper degree of judicial scrutiny is a function of two variables: first the nature of the right affected; and second, the identity of the plaintiff. If the classification 'interferes with the exercise of a fundamental right, or operates to the peculiar disadvantage of a suspect class, strict judicial scrutiny is then the standard of review.' (cit.omit.). Otherwise, the question is whether the classification bears 'a rational relationship to a legitimate state interest'" (cit. omit.).

The State has two problems in this Writ. First, the State wants to talk about persons convicted of crimes before a law becomes effective. The State of Oklahoma, in upholding the above equal protection analysis in State of Oklahoma v. Ballard, Case No. S-91-769, 65 OBAJ 560 (2/12/94), further states at 561; "No party has cited, and this Court is unable to find, any authority showing a person convicted of a crime, without more, is in a suspect classification." The State makes no showing that this class is a suspect one, or that it is "similarly situated" to Scott Hain's class. It is certainly outside the narrow class created by the Court in Allen v. State, 821 P.2d 371 (Okla.Cr. 1991) and Hain v. State, 852 P.2d 744 (Okla. Cr. 1993).

Second, as admitted by the State, their class is hypothetical. They allege, and there is in fact, no person in the class the State wishes to protect. The rule is clear that "It is the individual who is entitled to equal protection of the laws, and not merely a group of individuals or a body of persons..." Mitchell v. United States, 313 U.S. 80, at 97, 61 S.Ct. 873, 85 L.Ed 1201 (1941). The

State has no individual or person to protect.

Finally, equal protection is not a predicate for an action by a State. The case of Pennsylvania v. New Jersey, 426 U.S. 660, at 665, 96 S.Ct. 2333, 49 L.Ed 2d 124 (1976), states conclusively, "Claims brought by States on their own behalf cannot be predicated on alleged violations of the equal protection clause, because the equal protection clause protects people, not states."

Wherefore, the State has shown no jurisdiction pursuant to 28 U.S.C. § 1257 with its Reason I.

II. THE PETITIONER'S REASONS II AND III FAIL TO STATE JURISDICTIONAL ISSUES BECAUSE THE ISSUE OF GIVING THE LIFE WITHOUT PAROLE INSTRUCTION WAS DECIDED ON ADEQUATE INDEPENDENT STATE GROUNDS.

The rule for adequate and independent state grounds in direct appeal matters has been set forth in Michigan v. Long, 463 U.S. 1032, at 1042, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), and reiterated for the purposes of post conviction relief in Harris v. Reed, 489 U.S. 255, at 261, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). The Court wrote in Harris, id., citing Long, supra., "..., if 'it fairly appears that the state court rested its decision on federal law,' this Court may reach the federal question on review unless the state court's opinion contains a "plain statement that [its] decision rests upon adequate and independent state grounds.'"

In Hain v. State, supra., at 753, the Court stated, " As discussed in Allen v. State, 821 P.2d 371 (Okl. Cr. 1991), we find no constitutional prohibition to the application of this possible sentencing option in cases where the penalty became law in the period while the offender awaited trial. " Rather than recite the passages in full here, the salient portions of the opinion of the Court in Allen, supra, are attached to this Response, as "Appendix" and incorporated herein as if pled in full. The State did not file a § 1257 appeal in Allen, and there would possibly be a waiver of those issues here. Harris, supra, and Long, supra.

Upon consideration of the extensive discussion of the Oklahoma Court of Criminal Appeals in Allen, supra, the Respondent would assert that this Court must find that there is unequivocally a

"plain statement" that the decision of the Court of Criminal Appeals rests on adequate and independent state grounds. This is particularly clear when the said Court addresses the state sentencing and weighing procedures in death penalty cases. Therefore, the Petitioner is still without jurisdiction for this Writ. The Court found in Coleman v. Thompson, 501 U.S. ____, 111 S.Ct. 2546, at 2553, 115 L.Ed.2d 640 (1991):

" This Court will not review a question of federal law decided by a state court if the decision of that state court rests on a state law ground that is independent of the federal question and adequate to support the judgement. (cit.omit.) This rule applies whether the state law ground is substantive or procedural. (cit.omit.) In the context of direct review, the independent and adequate state law ground is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgement, resolution of any independent federal ground for the decision could not affect the judgement and would therefore be advisory."

CONCLUSION

The Court should deny the Petitioner's Writ of Certiorari because Equal Protection does not obtain in this case and the Court of Criminal Appeals made its decision on giving the life without parole instruction on adequate and independent state grounds. Therefore, this Court has no jurisdiction pursuant to 28 U.S.C. § 1257.

Respectively submitted,

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No. 93-1252

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THE STATE OF OKLAHOMA

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vs.

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Respondent.

CERTIFICATE OF SERVICE

I, John Thomas Hall, a member of the Bar of this Court, hereby certify that one (1) copy of the foregoing Response to Writ of Certiorari was mailed, first class, postage paid, to:

Ms. A. Diane Blaylock
Assistant Attorney General
112 State Capitol Bldg.
Oklahoma City, OK 73105.

John Thomas Hall
Attorney for the ~~Petitioner~~ Respondent

Dated: March 14, 1994

NO. 93-1252

STATE OF OKLAHOMA,
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APPENDIX TO
RESPONSE TO PETITION TO WRIT OF CERTIORARI

of his rights in any manner. We have considered the entirety of the proceedings and find that the record supports a finding of malice aforethought. *State v. Durant*, 609 P.2d 792 (Okl.Cr.1980).

[5] Having considered the errors which Appellant raises in connection with our review of the trial court's denial of Appellant's request to withdraw his guilty plea, we cannot reach the conclusion that the trial court erred. The decision to allow the withdrawal of a plea is within the sound discretion of the trial court and we will not interfere unless we find an abuse of discretion. *Hopkins v. State*, 764 P.2d 215 (Okl.Cr.1988); *Vuletich v. State*, 735 P.2d 568 (Okl.Cr.1987); *Ligon v. State*, 712 P.2d 74 (Okl.Cr.1986); *Darnell v. State*, 623 P.2d 617 (Okl.Cr.1981). Insofar as Petitioner has failed to allege any irregularities which would indicate that his plea was involuntary, we cannot say that the trial court abused its discretion.

[6] With the validity of Appellant's plea established, we shift our consideration to the penalty portion of the proceedings. We find that the trial court erred when it refused to consider the possible assessment of a sentence of life without parole. Accordingly we find that the case must be remanded to the trial court for a new trial on sentencing pursuant to 21 O.S.Supp. 1990, § 701.13(E).

[7] The issue before us now concerns whether or not the application of a newly enacted, intermediate level of punishment for the offense of First Degree Murder subsequent to the commission of the offense in question would violate the prohibitions against *ex post facto* laws found in both the Constitutions of the United States and the State of Oklahoma. We find that it would not.

[8] The purpose of the rules against the passage of *ex post facto* laws, Art. I, § 10 of the United States Constitution and Art. 2, § 15 of the Oklahoma Constitution, was to assure that "federal and state legislatures were restrained from enacting arbitrary or vindictive legislation." *Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987). In a criminal context, these protections apply only to laws or judicial interpretations which directly affect the punishment of the defendant. *Morris v. Meachum*, 718 P.2d 1354 (Okl. 1986). "[No] *ex post facto* violation occurs if a change does not alter 'substantial personal rights' but merely changes modes of procedure which do not affect matters of substance." *Miller*, 482 U.S. at 430, 107 S.Ct. at 2451, 96 L.Ed.2d at 360. *See also Barnes v. State*, 791 P.2d 101, 103 (Okl.Cr. 1990).

In *Miller*, the Supreme Court examined the *ex post facto* implications of changes in the Florida sentencing procedures which affected the punishment for crimes committed previous to the enactment of the changes. The Court was very specific in its definition of the purpose of the *ex post facto* clause, holding that it only applied in four very specific situations:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Id. quoting *Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798). The present case invokes concern under the third identified principle.

In *Miller*, the Court makes it quite clear that no violation occurs unless the change in the law alters "punishment beyond what was prescribed when the crime was consummated." *Id.* This holding accords with previous decisions of this Court. In *Dutton v. Dixon*, 757 P.2d 376, 379 (Okl. Cr.1988), this Court acknowledged that the rule required the finding of two elements; first, that the law was enacted subsequent to the conduct to which it was being applied; and second, " 'it must disadvantage

the offender affected by it.'" *Id.*, quoting *Miller*, 482 U.S. at 431, 107 S.Ct. at 2451, 96 L.Ed.2d at 360.

[9] Our analysis in such a case must focus on the potential punishments available for a particular act and not on the actual punishment received for the crime. *Id.* In the present case, the State admits that the change in penalty in question here did not affect the maximum or the minimum punishment to which Appellant could have been subjected. Instead, the State merely argues that the addition of an intermediate level of punishment is a substantive change rather than purely procedural, thus the prohibition applies. We cannot agree with this analysis.

There is no question that in this case consideration of the life without parole sentence is a retroactive application of a punitive statute. However, our analysis may not stop here. In order to affirm the trial court's refusal to consider this punishment, we must also find that imposition of the sentence could have disadvantaged Appellant by subjecting him to a harsher punishment than was available at the time he committed his crimes. While we will not speculate as to the comparative drawbacks between a life in prison without chance of parole and the actual imposition of the death penalty, we believe that any possibility of a sentence which avoids the death penalty cannot be said to be disadvantageous to the offender.

Accordingly, we find that the trial court's refusal to consider the possibility of imposing a sentence of life without parole provision under the provisions of 21 O.S.Supp.1987, § 701.10 was error. This result is even more compelling in the present case, wherein the Petitioner urged the court to consider the sentence and executed a valid waiver of his constitutional right against the application of any ex post facto law. The waiver of this right is just as valid as the waiver of any of the other constitutional protections given up in connection with a plea of guilty.

Our next consideration must be how the error may be rectified. It is true that in cases where the sentence is death, this Court has a wide spectrum of authority in conjunction with its appellate powers. In addition to the general power to "reverse, affirm or modify the judgment appealed from" provided in 22 O.S.1981, § 1066, the legislature enacted specific powers as a part of the capital sentencing procedures which control in death penalty cases. We are charged, in 21 O.S.1981, § 701.13, with determining, inter alia, "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." On the record before us, we must conclude that the trial court's error of law concerning the available sentencing options must be construed as an arbitrary factor, which has a negative impact on the validity of the death sentence.

It has long been recognized that a system of capital punishment must meet strict constitutional requirements to be upheld. The primary goal of any such system must be the allowance of individualized sentencing tempered by a controlled amount of discretion, exercisable by the trier of fact. *See generally, Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). In the present case, we are presented by a situation where the sentencer did not fully understand the options available, thus rather than the more usual case involving "unbridled discretion," we have just the opposite. The trial court committed no less an error, however, when it took such a restricted view of its sentencing options that it failed to allow Petitioner the full benefit of all the sentences provided by law.

We considered a similar sentencing problem in *Walker v. State*, 780 P.2d 1181 (Okl.Cr.1989). In that case, we held that when the trial court did not recognize the extent of its legal authority to fashion a proper punishment, it cannot be said that it had properly exercised its discretion. We held that when the trial court has operated under a mistaken impression of law, the case must be remanded for resentencing. We find that to be the appropriate remedy in this case.

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This Court has recognized, as has the Supreme Court, that many of the errors in capital cases may be found either to be harmless in light of the totality of the record on appeal, or that in the case of an invalid aggravating circumstance, reweighing by the appellate court may indicate that the death sentence would still have been given notwithstanding the absence of the invalid aggravator. *See Clemmons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). *See also Castro v. State*, 745 P.2d 394 (Okl.Cr.1787), *cert. denied*, 485 U.S. 971, 108 S.Ct. 1248, 99 L.Ed.2d 446 (1988), on reh. 749 P.2d 1146 (Okl.Cr.1987), *cert. denied* 485 U.S. 971, 108 S.Ct. 1248, 99 L.Ed.2d 446 (1988); *Stouffer v. State*, 738 P.2d 1349 (Okl.Cr. 1987), *on rehearing*, 742 P.2d 562 (Okl.Cr. 1987), *cert. denied* 484 U.S. 1036, 108 S.Ct. 763, 98 L.Ed.2d 779 (1988). In the case before us now, however, we cannot say that the error is harmless. Much testimony was presented concerning the ramifications of a life sentence. The trial court indicated that it chose the death sentence specifically for the purpose of keeping Petitioner in prison forever. We cannot predict what effect the third option of life without parole may have had on the sentence pronounced. Likewise, our ability to reweigh is not implicated here. We are not concerned with the finding that one of the aggravating circumstance, and its attendant evidence, should not have been considered by the trial court. We are instead faced with a situation where the court fell short of considering all available options. Reweighing the aggravating and mitigating evidence provides no guidance as to whether the trial court would have opted for a sentence of life without parole had it so considered. Although we find that Appellant's murder conviction is AFFIRMED, we find that our only viable option is to REMAND THE CASE FOR A NEW TRIAL ON SENTENCING, with the court giving proper consideration to all three possible punishments for the crime of First Degree Murder; Life in Prison, Life in Prison without the Possibility of Parole and the Death Penalty.

BRETT and JOHNSON, JJ., concur.

PARKS, J., specially concurs.

LUMPKIN, V.P.J., concurs in result.

PARKS, Judge, specially concurring:

This Court established guidelines for the taking of guilty pleas in *King v. State*, 553 P.2d 529 (Okl.Cr.1976). It continues to be the opinion of this writer that the *King* directives should be followed step by step whenever a plea of guilty or nolo contendere is entered. *Ocampo v. State*, 778 P.2d 920, 925 (Okl.Cr.1989) (Parks, P.J., concurring in part/dissenting in part). If they were, most of the questions concerning reliability of these pleas would be eliminated. Compliance with *King* "best expedites the interests of justice and promotes finality by foreclosing state and federal collateral attacks." *Ocampo*, 778 P.2d at 925. On the basis of *stare decisis*, however, I must yield my view to that of the majority of this Court and apply the standards set forth in *Ocampo*. Having done this, I concur in the instant case.

DENIAL OF PETITION FOR REHEARING

The State of Oklahoma has requested that this Court grant rehearing in the above captioned case on the basis that the decision to remand the case for resentencing runs afoul of the section of the Oklahoma statutes which prohibits retroactive application of statutes without specific authority from the legislature, 22 O.S.1981, § 3. The death sentence meted out to Allen by the jury was reversed by this Court and remanded to the trial court in order that consideration could be made as to all the appropriate punishments, including the option of life without parole. The State contends that this result is improper in that Section 3 of Title 22 prohibits retroactive application of newly passed or revised statutes.

[10] We disagree with the State's conclusion and hold that the provisions of Section 3 are applicable only to Title 22. In Section 1 of Title 22, the Legislature provided that "[t]his Chapter shall be known

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March 14, 1994

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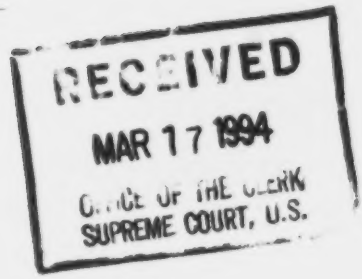

RE: Oklahoma v. Hain,
NO. 93-1252

Dear Mr. Sutter:

Enclosed is the Response to Writ of Certiorari. Please, file the Response and return a file stamped copy.

Thank you.

Sincerely,

John Thomas Hall